

SUMMARY ANALYSIS OF AMENDED BILL

Author: Vargas Analyst: Jeff Garnier Bill Number: AB 1351
 Related Bills: See Prior Analysis Telephone: 845-5322 Amended Date: June 27 & July 7, 2005
 Attorney: Patrick Kusiak Sponsor: Office of Administrative Law

SUBJECT: State Agency Regulations/Underground Regulations

DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as introduced/amended _____.

AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

AMENDMENTS DID NOT RESOLVE THE DEPARTMENT'S CONCERNS stated in the previous analysis of bill as introduced/amended _____.

☒ FURTHER AMENDMENTS NECESSARY.

DEPARTMENT POSITION CHANGED TO _____.

REMAINDER OF PREVIOUS ANALYSIS OF BILL AS AMENDED

☒ April 28, 2005, STILL APPLIES.

☒ OTHER – See comments below..

SUMMARY

This bill would add the following provisions to the Government Code:

- define “underground regulation” and
- Create a process for a determination of whether a state agency has issued such an underground regulation.

SUMMARY OF AMENDMENTS

The June 27, 2005, amendments would require the Office of Administrative Law (OAL) to determine whether to consider the underground regulation determination petition on its merits, in whole or in part, within 30 days of the petition being filed. A decision by OAL to decline to consider a petition would not be subject to judicial review. OAL would be required to notify the petitioner and the agency affected by the petition that OAL’s decision not to consider the petition has no impact on the merits of the petition. The amendments changed the time permitted for any interested person, which does not include a state agency, to file a petition for judicial review from 30 days to 90 days.

The June 27, 2005, amendments also clarify that a petition filed under the provisions of this bill is not required prior to a person seeking judicial review. Finally, the amendments resolved the department’s

Board Position:

☐ S ☐ NA ☐ NP
☐ SA ☐ O ☐ NAR
☐ N ☐ OUA ☒ PENDING

Legislative Director

Date

Brian Putler

08/29/05

technical concern regarding adding the term "procedure" when needed to the description of underground regulation.

The July 7, 2005, amendments define "emergency" for purposes of the issuance of emergency regulations. An "emergency" would mean a situation not foreseen in time to obtain an ordinary regulation and "requires immediate action to avoid serious harm evidenced by an imminent and substantial threat to the public peace, health, safety, or general welfare." "Emergency" would not mean expediency, convenience, best interest, or general public need. If the situation is not an emergency, as defined, an emergency regulation cannot be issued by an agency.

The July 7, 2005, amendments also would require the state agency requesting adoption of an emergency regulation to mail at least five days prior to filing the request a notice of proposed emergency action to certain persons. The amendments specify what information must be included in the notice of proposed emergency action and when this five-day notice would not be required.

The July 7, 2005, amendments would extend to 180 days from 120 days the maximum period of time a regulation, amendment, or order of repeal initially adopted would remain an emergency regulation. The amendments also authorize OAL to approve one re-adoption of an emergency regulation for a maximum period of 90 days. The amendments require OAL, after posting a notice of the filing of a proposed emergency regulation on its website, to allow interested persons five calendar days to submit comments on the proposed emergency regulations, unless delaying action to allow public comment would be inconsistent with the public interest.

Except for the addition of an implementation consideration, the remainder of the analysis for the bill as amended April 28, 2005, still applies.

POSITION

Pending.

IMPLEMENTATION CONSIDERATION

It is unlikely that the issuance of any Franchise Tax Board regulation would satisfy the definition of emergency under this bill because it would be rare that implementing a tax bill would involve an emergency situation requiring immediate action to avoid serious harm as defined. Thus, this bill would effectively preclude the department from issuing an emergency regulation. Some tax statutes are enacted with a requirement that regulations be adopted immediately because such regulations are necessary for the proper administration of the new statute as it relates to the current tax year. This bill would preclude the department from issuing regulations under those circumstances as well. The author may wish to consider amending the definition of "emergency" to provide that an emergency would include a situation where a statute is enacted that requires regulations to be adopted immediately by the state agency responsible for administering the statute.

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